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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Joshua Barkley,

v.

U.S. Department of Labor, National Labor  
Relations Board, Independent Certified  
Emergency Professionals of Arizona, and  
IAEP/NAGE/SEIU 5000

Case No.: 19-cv-01595-PHX-DWL

**U.S. DEPARTMENT OF LABOR'S  
MOTION TO DISMISS**

The U.S. Department of Labor (herein, "DOL"<sup>1</sup>), by and through undersigned counsel, hereby moves to dismiss all allegations against it pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). This Motion is supported by the following Memorandum of Points and Authorities, and all matters of record.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

In 2014, DOL conducted an investigation pursuant to 29 U.S.C. §§ 482(b) and 521, regarding the Independent Certified Emergency Professional's ("ICEP") failure to hold an election of officers.<sup>2</sup> See Doc. 1, *Perez v. Local 1, ICEP*, Case No. 14-cv-01723-PHX-NVW,

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<sup>1</sup> The National Labor Relations Board is represented by separate agency counsel.

<sup>2</sup>DOL requests that the Court take judicial notice of the existence of *Thomas E.*

1 July 31, 2014. This investigation culminated in DOL filing an action in this Court pursuant to  
2 29 U.S.C. § 482(c) for an Order directing ICEP to conduct an election for all of its officers  
3 under DOL's supervision. *Id.* Plaintiff attempted to appear in that action on behalf of ICEP  
4 in a *pro se* capacity, and Judge Wake struck Plaintiff's two filed answers from the docket. *See*  
5 Docs. 11, 22, 23, 30, 34, Case No. 14-cv-01723-PHX-NVW, July 31, 2014. After no answer  
6 for ICEP was filed, DOL filed a motion for default judgment on November 14, 2014. *Id.* at  
7 Doc. 37. On December 3, 2014, Judge Wake entered default judgment in favor of the DOL,  
8 and ordered that ICEP conduct an election for officers under the supervision of the DOL in  
9 accordance with Title IV of the Labor-Management Reporting and Disclosure Act of 1959  
10 ("LMRDA"). *Id.* at Doc. 40; *see also* Plaintiff's Complaint at Doc. 1, Exhibit 1, p. 51-54. The  
11 Court Ordered the DOL to follow certain procedures for the election, to hold the election,  
12 conduct installation of officers for the Union, and to issue a determination certifying the results  
13 of the election to the Court. *Id.*

14  
15 On February 12, 2015, Plaintiff filed a pre-election protest with the OLMS Election  
16 Supervisor, alleging numerous violations of the LMRDA and other laws during the conduct  
17 of the election. Doc 1, Exhibit 2 to Plaintiff's Complaint, p. 58-65. The DOL investigated the  
18 allegations and concluded there was no violation of the LMRDA. *Id.* On April 16, 2015, a  
19 certification of election was filed with the District Court in accordance with the Default  
20 Judgment Order. Doc 1, Exhibit 2 to Plaintiff's Complaint, p. 56-57. The Certification stated  
21 that the election had been conducted in accordance with the LMRDA and in conformity with

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*Perez, Secretary of Labor, United States Department of Labor v. Local 1, Independent*  
24 *Certified Emergency Professionals*, Case No. 14-01723 (D. Ariz.), and the pleadings filed  
25 on the docket therein. Judicial notice of this proceeding is appropriate because it is related  
26 to the instant case and the accuracy of the pleadings and orders filed therein can be readily  
27 ascertained. *See* Fed. R. Evid. 201(b); *Reyn's Pasta Bella, LLC v. VISA USA, Inc.*, 442 F.3d  
28 741, 746 n. 6 (9th Cir. 2006) (to determine what issues were litigated in an earlier case,  
court was permitted to take judicial notice of plaintiff's briefs and transcripts of  
proceedings from earlier case). This court may take judicial notice of "matters of public  
record" without converting a motion to dismiss into a motion for summary judgment. *See*  
*Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

1 the constitution and bylaws of the ICEP, and listed the names of the candidates who had been  
2 duly elected. *Id.*

3       On December 7, 2015, Plaintiff filed a “Motion for Expedited Clarification” with the  
4 Court, seeking an entry of a decree or order pursuant to 29 U.S.C. § 482 declaring whether the  
5 officers certified by the DOL were in fact officers of ICEP. Doc. 42, Case No. 14-cv-01723-  
6 NVW. Plaintiff stated that the court’s “decree is required for any labor organization to  
7 continue operations under the existing administration or by a new administration installed by  
8 the courts, based on this decree.” *Id.* The next day, Judge Wake ordered Plaintiff’s motion  
9 stricken, explaining that Plaintiff was a non-party and the case had been closed for more than  
10 a year before the Plaintiff’s filing. Doc. 43 at 1, Case No. 14-cv-01723-NVW. No further  
11 entries are indicated on that case’s docket. *See* Doc., Case No. 14-cv-01723-NVW

12       On March 8, 2019, Plaintiff filed this a Complaint against the DOL, DOL employees  
13 Patricia Fox, Phoenix Beausoleil, Edgar Oquendo, and Thomas Hayes, the National Labor  
14 Relations Board (“NLRB”), NLRB employees Cornele Overstreet, Miguel Rodrigues, and  
15 Keith Ebenholtz, ICEP of Arizona and IAEP/NAGE/SEIU 5000, alleging a variety of claims  
16 stemming from the March 2015 election that removed him as President of the ICEP. Doc. 1,  
17 at ¶¶43-45. On April 23, 2019, Plaintiff filed an Amended Complaint, wherein he no longer  
18 lists the DOL employees as individual defendants and does not invoke *Bivens* claims against  
19 them or allege any specific individual capacity claims against them.<sup>3</sup> *See* Doc. 21. Plaintiff  
20 appears to claim that a lack of decree from Judge Wake certifying the election of the ICEP  
21 officers precipitated certain illegal activity initiated by the elected officers. *Id.* As to the DOL,  
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23  
24       <sup>3</sup>Plaintiff’s Amended Complaint appears to allege constitutional claims against the  
25 DOL and its employees in their official capacity only. *See* Doc. 21. As discussed below,  
26 these claims are subject to dismissal for lack of subject matter jurisdiction. To the extent  
27 Plaintiff seeks to sue any federal employee in their individual capacity, which is not  
28 apparent from his Amended Complaint, he has not properly served such individuals.  
Therefore no response from such individuals is currently due. *See* Fed. R. Civ. P. 12(a)(3).  
To the extent proper service occurs, those individuals will have 60 days to file a response,  
though undersigned counsel is not presently authorized to represent those individuals in  
their personal capacities. *Id.*

1 Plaintiff appears to allege a variety of claims under Title 18 of the U.S. Code, constitutional  
2 claims, claims for tortious interference with contract under the Federal Tort Claims Act  
3 (“FTCA”), and declaratory and injunctive relief for violations of the LMRDA. For the reasons  
4 set forth below, all claims asserted against the DOL should be dismissed pursuant to Fed. R.  
5 Civ. P. 12(b)(1) or alternatively Fed. R. Civ. P. 12(b)(6).

## 6 **II. LEGAL STANDARD**

### 7 **A. Legal Standard for Fed. R. Civ. P. 12(b)(1)**

8 Under Rule 12(b)(1), a Defendant may move to dismiss an action for lack of subject  
9 matter jurisdiction. On such a motion, the plaintiff bears the burden of establishing that subject  
10 matter jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377  
11 (1994). To establish subject matter jurisdiction in an action against the United States, there  
12 must be: (1) “statutory authority vesting a district court with subject matter jurisdiction;” and  
13 (2) “a waiver of sovereign immunity.” *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008,  
14 1016 (9th Cir. 2007). Even where statutory authority vests the district court with subject matter  
15 jurisdiction, the United States cannot be sued unless it has expressly consented to be sued.  
16 *Dunn & Black P.S.*, 492 F.3d 1084, 1087-88 (9th Cir. 2007). Waivers of sovereign immunity  
17 cannot be implied, must be unequivocally expressed, and are to be strictly construed in favor  
18 of the sovereign. *Id.* at 1088. A party bringing suit against the United States bears the burden  
19 of demonstrating both elements of subject matter jurisdiction; where it has failed to do so,  
20 “dismissal of the action is required.” *Id.*

### 21 **B. Legal Standard for Fed. R. Civ. P. 12(b)(6)**

22 In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint  
23 must contain “sufficient factual information, accepted as true, in order to state a claim for relief  
24 that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). “A claim has  
25 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
26 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This  
27  
28

1 plausibility standard “asks for more than a sheer possibility that a defendant has acted  
 2 unlawfully,” and the examination is a “context-specific task that requires [a court] to draw on  
 3 [its] judicial experience and common sense. *Id.* at 1949-50. “Naked assertions devoid of  
 4 further factual enhancement will not do.” *Id.*

### 5 **III. ARGUMENT**

#### 6 **A. Plaintiff’s claims should be dismissed pursuant to Fed. R. Civ. P. 7 12(b)(1) for lack of subject matter jurisdiction**

##### 8 *1. Plaintiff has no private right of action for criminal violations under Title 18 9 of the U.S. Code.*

10 Plaintiff claims he is entitled to relief against the DOL under the following criminal  
 11 statutes: 18 U.S.C. 241-242 (Deprivation); 18 U.S.C. § 371 (conspiracy to commit offense or  
 12 to defraud the United States); 18 U.S.C. § 872 (Extortion); 18 U.S.C. § 880 (Extortion by  
 13 officers or employees of the United States); 18 U.S.C § 1951 (Interference with commerce by  
 14 threats or violence); 18 U.S.C. 1018 (Official Certificates or writings); and 18 U.S.C. Chapter  
 15 96 (Racketeer Influenced and Corrupt Organizations). *See* Dkt. 21, p. 25-26; 30-32; 37-39.  
 16 These provisions do not provide a waiver of the DOL’s sovereign immunity. It is axiomatic  
 17 that “the United States may not be sued without its consent and [] the existence of such consent  
 18 is a prerequisite to jurisdiction.” *United States v. Mitchell*, 463 U.S. 206, 211, 103 S. Ct. 2961,  
 19 77 L. Ed. 2d 580 (1983). The United States’ consent must be unequivocal and may not be  
 20 implied. *Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir. 1998). These criminal statutes do not  
 21 provide a waiver of the DOL’s sovereign immunity; accordingly, Plaintiff’s claims should be  
 22 dismissed.

23 Additionally, these criminal statutes do not provide Plaintiff a private right of action  
 24 in the district court. Private rights of action under criminal statutes have been rarely been  
 25 implied. *Chrysler Corp v. Brown*, 441 U.S. 281, 316, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979).  
 26 Private rights of action under criminal statutes have been implied *only* when “there was at least  
 27 a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.”  
 28

1 *Id. See, e.g., Diamond v. Charles*, 476 U.S. 54, 64, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)  
 2 ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution  
 3 of another."). Courts have held that the specific criminal statutes alleged by Plaintiff do not  
 4 provide a private right of action. *See, e.g., Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir.  
 5 1996) ("We summarily reject the . . . RICO claims against the [government] . . . government  
 6 entities are incapable of forming [the] malicious intent necessary to support a RICO action.");  
 7 *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 408 (8th Cir. 1999) (holding that  
 8 "neither the statutory language of 18 U.S.C. § 1951 nor its legislative history reflect an intent  
 9 by Congress to create a private right of action"); *Alexandre v. Phibbs*, 116 F.3d 482 (Table),  
 10 1997 WL 341830, \*1 (9th Cir. June 19, 1997) (same); *Allen v. Gold County Casino*, 464 F.3d  
 11 1044, 1048 (9th Cir. 2006) (affirming the dismissal of claims under 18 U.S.C. §§ 241 and 242  
 12 because these "are criminal statutes that do not give rise to civil liability"); *Forney v. Hitner*,  
 13 2013 WL 6513031, \* 2 (W.D. Wash. Dec. 12, 2013) (dismissing claim under 18 U.S.C. § 371  
 14 because it is "a criminal statute and not a proper basis for civil liability"); *Bendorf v. Ojai Basin*  
 15 *Groundwater Management Agency*, 2012 U.S. Dist. LEXIS 126961, 2012 WL 3867352, at  
 16 \*12 (C.D. Cal. July 16, 2012) (no private right of action under 18 U.S.C. § 872); *Marian v.*  
 17 *Castro*, No. CV-16-8276 DMG, 2017 U.S. Dist. LEXIS 221804, at \*4 (C.D. Cal. Apr. 13,  
 18 2017) (No private right of action under 18 U.S.C. § 880); *Steinman v. IRS*, 1996 WL 512333,  
 19 \* 5 (D. Ariz. 1996) (no private right of action under 18 U.S.C. §§ 241 and 242).

21 Accordingly, each of Plaintiff's claims under Title 18 of the U.S. Code against the  
 22 DOL should be dismissed for lack of subject matter jurisdiction as they provide no waiver of  
 23 sovereign immunity and/or provide no private right of action.

24 2. *Plaintiff's constitutional claims must be dismissed because they are barred*  
 25 *by sovereign immunity.*

26 Plaintiff has alleged that the DOL violated his Fifth and Fourteenth Amendment rights  
 27 by, among other things, pursuing and conducting the court supervised election of ICEP's  
 28



1 officers. *See* Dkt. 21, p. 25; 31-32. *See also* Footnote 3, *supra*. Such claims are barred by  
 2 sovereign immunity. It is well settled that Plaintiff’s constitutional or *Bivens* claims cannot be  
 3 brought against either the United States, its agencies, or its officers or employees acting in  
 4 their official capacities. *See FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (holding that federal  
 5 agencies are not proper defendants in a *Bivens* action); *Daly-Murphy v. Winston*, 837 F.2d.  
 6 348, 355 (9th Cir. 1987) “[A] *Bivens* action can be maintained against a defendant in his or  
 7 her individual capacity only, and not in his or her official capacity.”). Accordingly, the court  
 8 should dismiss Plaintiff’s constitutional claims against the DOL and its employees who are  
 9 alleged to have been acting in their official capacities pursuant to Fed. R. Civ. P. 12(b)(1).

11 3. *Plaintiff’s Tortious Interference Claim is barred by 28 U.S.C. § 2680(h).*

12 Plaintiff’s Amended Complaint alleges claims of tortious interference with contract.  
 13 *See* Dkt. 21, p. 46-49. To the extent these claims can be construed to be alleged against the  
 14 DOL, they should also be dismissed as barred by sovereign immunity. The FTCA provides a  
 15 limited waiver of sovereign immunity for certain torts committed by federal employees acting  
 16 in the scope of their federal employment. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The  
 17 FTCA does not waive sovereign immunity in all respects; Congress was careful to except from  
 18 the Act several important classes of tort claims. *United States v. Varig Airlines*, 467 U.S. 797,  
 19 808 (1984). Section 2680(h) of the FTCA expressly bars any claims arising out interference  
 20 with contract rights, stating that the provisions of the FTCA shall not apply to “[a]ny claim  
 21 arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse  
 22 of process, libel, slander, misrepresentation, deceit, or interference with contract rights [...]”  
 23 28 U.S.C. § 2680(h) (1976); *See Goodman Grp., Inc. v. Dishroom*, 679 F.2d 182, 184 (9th Cir.  
 24 1982) (“The Federal Tort Claims Act is explicit in excluding for its coverage any claim arising  
 25 out of interference with contract rights”).

26 To the extent Plaintiff’s claims for tortious interference with contracts is construed to  
 27 be alleged against the DOL, they should be dismissed as barred by 28 U.S.C. § 2680(h). *See*  
 28

1 *id.*; Fed. R. Civ. P. 12(b)(1).

2 4. *Plaintiff's claims for declaratory and injunctive relief under the LMRDA*  
 3 *should be dismissed for lack of subject matter jurisdiction or alternatively for*  
 4 *failing to state a claim.*

5 Plaintiff alleges that that the DOL violated the LMRDA, 29 U.S.C. § 482 and 29  
 6 U.S.C. §530, in conducting the union election and by not obtaining a final decree from the  
 7 District Court in the case *Perez v. I Local, ICEP*, Case No. 14-cv-01723-NVW. *See* Doc.  
 8 21, p. 38-30; 49-52. Plaintiff seeks declaratory and injunctive relief relative to these claims.  
 9 *Id.* Plaintiff's claims fail for several reasons.

10 First, there is no waiver of sovereign immunity under the LMRDA provisions cited  
 11 by Plaintiff to bring suit against the DOL. Second, "the exclusivity provision included in  
 12 [29 U.S.C. § 483] of Title IV plainly bars Title I relief when an individual union member  
 13 challenges the validity of an election that has already been completed," as is the case here.  
 14 *Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen*  
 15 *& Packers v. Crowley*, 467 U.S. 526, 541 (1984). Third, there is no private right of action  
 16 for alleged violations of 29 U.S.C. §§ 482 and 530. *See Rodriguez v. Serv. Employees*  
 17 *Intern.*, 755 F. Supp. 2d 1033 (N.D. Cal. 2010); *Hall v. Marshall*, 476 F.Supp. 262, 265 (E.D.  
 18 Pa. 1979), *aff'd mem.*, 622 F.2d 578 (3d Cir. 1980).

19 Fourth, Plaintiff fails to state a claim under these statutes in several regards. First,  
 20 Plaintiff's LMRDA Title I claims relating to the DOL's actions in 2014 to 2015 are time  
 21 barred since the statute of limitations for such claims is two years. *See Reed v. United*  
 22 *Transp. Union*, 488 U.S. 319, 334 (1989) (holding that claims under LMRDA Title I are  
 23 governed by state general or residual personal injury statutes of limitation); Ariz. Rev. Stat.  
 24 § 12-542 (providing a two year statute of limitations). Second, Plaintiff has failed to allege  
 25 any facts indicating that the DOL failed to supervise a valid election or that the DOL any  
 26 control over the Court with regard to issuing the decree contemplated in 29 U.S.C. § 482(c).  
 27 The docket in *Perez v. I Local, ICEP*, reflects that subsequent to the Court's entry of default  
 28



1 judgment and the DOL's filing of a certification of the election, the Court did not issue a  
2 decree as provided for in 29 U.S.C. § 482. *See* Doc., Case No. 14-cv-01723-NVW. The  
3 Court's statement in its order striking Plaintiff's Motion for Clarification that the "case was  
4 terminated upon entry of default judgment against [ICEP]" suggests that it did not view  
5 issuing the decree after the supervised election to be necessary. Doc. 43 at 1, Case No. 14-  
6 cv-01723-NVW. Regardless of the Court's intention, its failure to enter a decree in that case  
7 is not the DOL's fault and is not a basis for judgment against the DOL. DOL complied with  
8 the requirements under 29 U.S.C. § 482 to conduct the supervised election, certify the results,  
9 and install the duly elected officers. It was then the Court's obligation to review the DOL's  
10 certification and enter a decree. *See, e.g., Hodgson v. Chain Serv. Rest., Luncheonette &*  
11 *Soda Fountain Emp. Union, Local 11, Hotel & Rest. Emp. & Bartenders Int'l Union, AFL-*  
12 *CIO*, 355 F. Supp. 180, 188 (S.D.N.Y. 1973) (describing the "judicial obligation" to issue a  
13 final decree that falls on the court after the DOL issues its certification). DOL has no  
14 authority over the court and cannot be liable for any errors committed by the court in not  
15 issuing a decree.  
16

17 Further, any failure of the Court to enter a decree does not undermine the integrity  
18 of the supervised election. DOL's supervision of an election "establishes a presumption of  
19 fairness and regularity." *Brennan v. Int'l Union of Dist. 50, Allied & Tech. Workers of U.S.*  
20 *& Canada*, 499 F.2d 1051, 1059 (D.C. Cir. 1974). As explained in the Certification of  
21 Election, the supervised election was valid and in compliance with Title IV of the LMRDA.  
22 Doc 1, Exhibit 2 to Plaintiff's Complaint, p. 56-57. Plaintiff has not alleged any facts  
23 suggesting that the election was unfair or unlawful. Additionally, any assertion that the  
24 installation of the new officers was unlawful in absence of a court order is incorrect. As one  
25 court has noted in deciding that it was appropriate, even prior to certification by the election  
26 supervisor, to install newly elected officers in a supervised election conducted pursuant to a  
27 consent decree, "it is apparent that the LMRDA requires the prompt implementation of union  
28

1 election results.” *See United States v. Int’l Bhd. of Teamsters*, 957 F. Supp. 55, 59 (S.D.N.Y.  
2 1997). “[E]nforcement of election results properly evaluated and approved by the Secretary  
3 of Labor promotes the purpose and goal of the Labor–Management Reporting and Disclosure  
4 Act[.]” *Dole v. Nat’l All. of Postal & Fed. Employees*, 725 F. Supp. 56, 60 (D.D.C. 1989).  
5 In contrast, it would be contrary to the LMRDA for the union’s prior officers to remain in  
6 office indefinitely despite a court order finding those officers’ incumbency to be unlawful  
7 and ordering a new supervised election be conducted.  
8

9 Accordingly, Plaintiff’s claims relating to the LMRDA should be dismissed for lack  
10 of subject matter jurisdiction or alternatively for failing to state a claim upon which relief  
11 may be granted.

#### 12 IV. CONCLUSION

13 For the foregoing reasons, DOL respectfully requests that this Court dismiss  
14 Plaintiff’s claims against them pursuant to Fed. R. Civ. P. 12(b)(1) or alternatively Fed. R.  
15 Civ. P. 12(b)(6).  
16

17 Respectfully submitted this this 13<sup>th</sup> day of May, 2019.

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20 District of Arizona

21 s/ Anne E. Nelson  
22 ANNE E. NELSON  
23 Assistant U.S. Attorney  
24 *Attorneys for Defendant*  
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**CERTIFICATE OF CONFERRAL**

Pursuant to this Court’s Order, Doc. 7, I notified Plaintiff Joshua Barkley of the issues asserted in the foregoing Motion to Dismiss. Plaintiff responded by letter on May 10, 2019, indicating that he did not agree with the bases for the dismissal of the complaint and “would defer to the Court on any decisions on the Amended Complaint.”

s/ Anne E. Nelson

ANNE E. NELSON

Assistant U.S. Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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